

HOUSE No. 1723

The Commonwealth of Massachusetts

PRESENTED BY:

Angelo M. Scaccia

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act relative to substantive changes to the Massachusetts Business Act.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Angelo M. Scaccia	14th Suffolk
William F. Galvin	Secretary of the Commonwealth

The Commonwealth of Massachusetts

In the Year Two Thousand and Nine

AN ACT RELATIVE TO SUBSTANTIVE CHANGES TO THE MASSACHUSETTS BUSINESS ACT.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

() Section 1.40 of Chapter 156D is amended by adding at the end of subsection (a) the following paragraph:

“Voting power” means the current power to vote in the election of directors.

() Section 2.02(b)(4) of Chapter 156D is deleted in its entirety and replaced with the following:

A provision eliminating or limiting the personal liability of a director to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director notwithstanding any provision of law imposing such liability; but the provision shall not eliminate or limit the liability of a director (i) for any breach of the director’s duty of loyalty to the corporation or its shareholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) for improper distributions under section 6.40, or (iv) for any transaction from which the director derived an improper personal benefit.

() Section 7.07(c) of Chapter 156D is deleted in its entirety and replaced with the following:

A determination of shareholders entitled to notice of or to vote at a shareholders’ meeting is effective for any adjournment of the meeting unless the board of directors fixes a new record date, which it shall do if the meeting is adjourned to a date more than 120 days after the record date fixed for the original meeting.

() Section 7.44(a) of Chapter 156D is deleted in its entirety and replaced with the following:

A derivative proceeding commenced after rejection of a demand shall be dismissed by the court on motion by the corporation if the court finds that either: (1) 1 of the groups specified in subsections (b)(1) and (2) or (f) has determined in good faith after conducting

a reasonable inquiry upon which its conclusions are based that the maintenance of the derivative proceeding is not in the best interests of the corporation; or (2) shareholders specified in subsection (b)(3) have determined that the maintenance of the derivative proceeding is not in the best interests of the corporation.

() Section 7.44(e) of Chapter 156D is deleted in its entirety and replaced with the following:

If a majority of the board of directors does not consist of independent directors at the time the determination by independent directors is made, the corporation shall have the burden of proving that the requirements of subsection (a) have been met and that the determination that maintenance of the derivative proceeding is not in the best interests of the corporation was reasonable and principled. If a majority of the board of directors consists of independent directors at the time the determination is made or if the determination is made by shareholders pursuant to clause (3) of subsection (b) or is made pursuant to subsection (f), the plaintiff shall have the burden of proving that the requirements of subsection (a) have not been met and, if the determination is made by a group specified in clauses (1) or (2) of subsection (b), that the independent directors, in making the determination, have not met the standard set forth in Section 8.30.

() Section 8.21(a) of Chapter 156D is deleted in its entirety and replaced with the following:

Unless the articles of organization or bylaws provide that action required or permitted by this chapter to be taken by the directors may be taken only at a meeting, the action may be taken without a meeting if the action is taken by the unanimous consent of the members of the board of directors. The action must be evidenced by 1 or more consents describing the action taken, in writing, signed by each director, or delivered to the corporation by electronic transmission, to the address specified by the corporation for the purpose or, if no address has been specified, to the principal office of the corporation, addressed to the secretary or other officer or agent having custody of the records of proceedings of directors for inclusion in the records of meetings.

() Section 9.52(6) of Chapter 156D is amended by deleting clause (1) thereof in its entirety and replacing it with the following:

Would have a right to vote as a separate voting group on a provision in the plan that, if contained in a proposed amendment to articles of organization, would require action by separate voting groups under section 10.04; provided, however, that receipt of interests in another entity in exchange for shares pursuant to a plan of conversion shall not entitle holders of the exchanged class or series to vote as a separate voting group based solely on the grounds that they were receiving interests in a different issuer; or

() Section 10.04(a) is amended by inserting at the beginning thereof the following:

Subject to section 10.05,

() Section 11.04(6) of Chapter 156D is deleted in its entirety and replaced with the following:

Except as otherwise expressly provided in the article of organization, voting by a class or

series of shares as a separate voting group is required on a plan of merger or share exchange if the plan contains a provision that, if contained in a proposed amendment to articles of organization, would entitle such class or series to vote as a separate voting group on the proposed amendment under section 10.04; provided however, that (i) receipt of shares of a class or series of shares in exchange for shares pursuant to a plan of merger or share exchange involving each outstanding class and series shall not entitle holders of the exchanged class or series to vote as a separate voting group based solely on the grounds that they are receiving shares of a different issuer or that clauses (1) or (5) of section 10.04 would apply if the change were contained in a proposed amendment to the articles of organization, and (ii) if the proposed provision would, as an amendment, entitle two or more classes or series of shares to vote separately but would affect those classes or series in the same or a substantially similar way, the shares of all such classes or series shall, unless the articles of organization provide otherwise, vote together as a single voting group on the plan.

() Section 13.01 of Chapter 156D is amended by deleting the paragraph beginning “Marketable securities” in its entirety and replacing it with the following:

“Marketable securities”, securities held of record by, or by financial intermediaries or depositories on behalf of, at least 1,000 persons and which were

(a) listed on a national securities exchange, or

(b) listed on a regional securities exchange or traded in an interdealer quotation system or other trading system and had at least 250,000 outstanding shares, exclusive of shares held by officers, directors and affiliates, which have a market value of at least \$5,000,000.

() Section 13.02(a)(1) of Chapter 156D is deleted in its entirety and replaced with the following:

(a) A shareholder is entitled to appraisal rights, and obtain payment of the fair value of his shares in the event of, any of the following corporate or other actions:

(1) consummation of a plan of merger to which the corporation is a party if shareholder approval is required for the merger by section 11.04 or the articles of organization or if the corporation is a subsidiary that is merged with its parent or another subsidiary under section 11.05, unless, in either case, (A) all shareholders are to receive only cash for their shares in amounts proportionate to what they would receive upon a dissolution of the corporation or, in the case of shareholders already holding marketable securities in the merging corporation, only marketable securities of the surviving corporation, marketable securities of the parent in the case of a merger with a subsidiary and/or cash and (B) no director, officer or controlling shareholder has a direct or indirect material financial interest in the merger other than (i) in his capacity as a shareholder of the corporation or as a director, officer, employee or consultant of either the merging or the surviving corporation or of any affiliate of the surviving corporation if his financial interest

100 is pursuant to bona fide arrangements with either corporation or any such affiliate,
101 or (ii) in any other capacity so long as the shareholder owns not more than five
102 percent of the voting shares of all classes and series of the corporation in the
103 aggregate;

104 () Section 13.02(a) of Chapter 156D is amended by adding at the end thereof the following:

105 (9) consummation of a domestication if the shareholder would have had appraisal rights
106 if the transaction had been effected as a merger.

107 () Section 13.02(b) of Chapter 156D is deleted in its entirety and replaced with the following:

108 Except as otherwise provided in subsection (a) of section 13.03, in the event of corporate
109 action specified in clauses (1), (2), (3), (7), (8) or (9) of subsection (a), a shareholder may
110 assert appraisal rights only if he seeks them with respect to all of his shares of whatever
111 class or series.

112 () Section 16.20(c) of Chapter 156D is deleted in its entirety and replaced with the following:

113 A corporation shall deliver the annual financial statements, or a written notice of their
114 availability, to each shareholder before the earlier to occur of the annual meeting of
115 shareholders or 120 days after the close of the fiscal year. Thereafter, the corporation
116 shall deliver its most recent annual financial statements upon the written request of any
117 shareholder to whom the statements were not delivered.